Mohd Sobri bin Che Hassan v Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai & Anor

HIGH COURT (PULAU PINANG) — APPLICATION FOR JUDICIAL REVIEW NO 25–21–02 OF 2014
ROZANA ALI J
10 JULY 2024

Labour Law — Wrongful dismissal — Assessment of damages — Application for judicial review against decision of local authority in dismissing employee — High Court found employee's dismissal valid — Court of Appeal found employee was wrongfully dismissed — Court of Appeal granted certiorari to quash decision of local authority — Federal Court found employee's dismissal unlawful — Federal Court limited employee's employment from date of employee's dismissal to date of Federal Court judgment — Federal Court ordered for assessment of damages by High Court judge — Whether employee was entitled to claim for damages from date of his unlawful dismissal until date of Federal Court's decision — Whether employee was entitled to claim for damages from date of his unlawful dismissal until date when employee was deemed to retire — Whether employee was entitled to claim for salary and allowances, loss of promotion, pensions, gratuity, Golden Handshake, loss of medical benefits, and damages for embarrassment, anguish and suffering — Public Officers (Appointment, Promotion and Termination of Service) Regulations 2012 regs 27(4) & 39 — Statutory and Local Authorities Pensions Act 1980

The second respondent was the Local Authority of Seberang Perai whereas the first respondent was the second respondent's disciplinary body. The applicant in the present case was employed by the second respondent until his employment was terminated when the chairman of the first respondent found him guilty for the charge of applying external influence to achieve a personal aim. The applicant then filed a judicial review application against his dismissal but the High Court dismissed such application as the High Court found that his dismissal was valid. However, on appeal, the Court of Appeal found in favour of the applicant and granted the following prayers: (a) a certiorari to quash the decision of the first respondent; (b) an order for damages and damages be assessed; and (c) costs in the cause. Aggrieved, the respondents appealed to the Federal Court. The Federal Court dismissed the appeal with some modifications to the order of the Court of Appeal. The Federal Court upheld the grant of the writ of certiorari but such decision shall only rendered the applicant in the employment of the second respondent from the date he was unlawfully dismissed on 28 November 2013 up to the date of delivery of the judgment. The Federal Court also upheld the order of the Court of Appeal in that the applicant be awarded damages to be assessed by a judge of the High

Court. The present case was in relation to the said assessment of damages as ordered by the Federal Court. In this regard, the applicant claimed the following: (i) salary and allowances from 3 December 2013 till 20 October 2019 amounting RM397,090.70 and bonus, for the years 2013 till 2019 amounting to RM30,944.72; (ii) damages for loss of promotion and the increment in respect of such promotion; (iii) pensions after 15 December 2035, and salary and bonus after 21 October 2019 till 15 December 2035; (iv) gratuity from 1 July 2002 till 15 December 2035; (v) Golden Handshake; (vi) loss of medical benefits; and (vii) damages for embarrassment, anguish and suffering. The issues that arose in the present case were: (A) whether the applicant was entitled to claim for damages from the date of his unlawful dismissal which was from 28 November 2013 until the date of the decision of the Federal Court on 21 October 2019 ('the first issue'); (B) whether the applicant was entitled to claim for damages from the date of his unlawful dismissal until the applicant was deemed to retire upon attaining the age of 60 years on 15 December 2035 ('the second issue'); and (C) whether the applicant was entitled, from the date he was deemed to retire, to claim pension benefits which was payable to the applicant or his wife after the demise of the applicant ('the third issue').

Held:

(1) It was trite that the court in assessing damages ought to take into consideration three fundamental principles which were: (a) restitution in integrum; (b) remoteness of damages; and (c) mitigation of damages. Further, in awarding damages, the court ought to ensure that the applicant was not allowed to profit from it. It was axiomatic that the applicant seeking substantial damages had the burden of proving both the fact and the amount of damages before he could recover the same (see paras 32–33).

(2) The court took cognisance that the Federal Court limited the applicant in the employment of the second respondent from 28 November 2013 to 21 October 2019 and stated that an effective reinstatement was not warranted on the facts of the case. From this position, the court was of the view that the Federal Court had already decided on the liability and allowed the applicant's judicial review for the unlawful dismissal. Since the order of the Federal Court was to solely determine the assessment of damages, the issue of the claim was not pleaded did not arise. Further, the court opined that the Federal Court's decision brought about a complete cessation of employer and employee relationship. In the same contact the applicant was no longer in the employment of the second respondent after the date of the Federal Court judgment. Therefore, there was no necessity for the respondents to issue a notice of termination to the applicant after the Federal Court judgment (see paras 34–35).

(3) In relation to the second issue, the court found that there was no continuity in service of the applicant after the date of the Federal Court judgment that rendered the applicant to be entitled to any consequential benefits thereafter. Therefore, the applicant was not entitled to claim for damages from the date of his unlawful dismissal which was from 28 November 2013 until the applicant was deemed to retire upon attaining the age of 60 years on 15 December 2035. Following this finding, the answer to the first issue was in the affirmative. In this regard, the Federal Court held at paras 110 and 111 of the grounds of judgment that the principle of 'no work no pay' had not been applied by the courts in Malaysia. The Federal Court observed that the applicant ought not to be denied compensation on the basis that he did not work as it was the respondents themselves who unlawfully dismissed him in the first place (see paras 38–41).

(4) The court was mindful that pursuant to reg 27(4) of the Public Officers (Appointment, Promotion and Termination of Service) Regulations 2012 ('the 2012 Regulations'), the annual salary movement of the applicant was based on his annual work performance and in the present case, there was no appraisal of the applicant's work performance from the date of the applicant's dismissal until the judgment of the Federal Court. However, it must be borne in mind that the absence of such appraisal was due to the applicant's wrongful dismissal by the respondents and not the fault of the applicant. Further, the court was also mindful that bonus was not automatic but subject to conditions imposed by the Federal Government or the State Authority. However, if the bonus were given during the period of 2013 to 2019, the applicant rightfully entitled to the bonus, same with other employees of the respondents at the material period. The court therefore allowed the applicant's claim for salary and allowances as well as bonus (see paras 43–45).

(5) The court was of the view that an employee including the applicant did not have a right to be promoted since it was a matter of discretion as specified in reg 39 of the 2012 Regulations. Therefore, the applicant's claim for damages for loss of promotion and the increment in respect of such promotion was dismissed. Regarding the applicant's claim for pensions, it ought to be reiterated that pursuant to the Federal Court judgment, the applicant was no longer in the employment of the second respondent. Thus, in the court's opinion, the applicant was also not a retired second respondent's employee and as such, the court dismissed the claim for pensions (see paras 46–47).

(6) It was clear that the applicant had been in the service of the second respondent from 1 July 2002 until 21 October 2019 only, which was 17 years three months 20 days. Thereafter, the applicant could no longer be deemed to be in the employment of the second respondent. The issue

of the applicant being entitled to pension and gratuity did not arise as there was no 'deeming fiction' in the Statutory and Local Authorities Pensions Act 1980 that the pension, gratuity and other benefits accrued in favour of the applicant automatically by such fiction. In such circumstances, the applicant could not also be deemed to be continuing in service till he attained the age of retirement. The court therefore dismissed the applicant's claim for gratuity (see para 50).

(7) Due to the unforeseen circumstances which led to the unlawful dismissal of the applicant, the court was of the view that the applicant had been deprived of the opportunity to apply for the accumulation of the unused vacation leave only with respect of the duration from 2 December 2013 until 21 October 2019 and not beyond. Therefore, the court found that the applicant was entitled to Golden Handshake subject to number of days but limited to 150 days only calculated from 2013 until 21 October 2019 of his unused maximum of 15 days/annually. Based on the record and the court's calculation, the applicant entitlement for the Golden Handshake was RM12,400.80 (see para 52).

(8) With regard to the applicant's claim for loss of medical benefits entitlement amounting to RM10,000, it was not disputed that all employees of the second respondent received free medical treatment in all government hospitals and government health clinics. In any other circumstances if the applicant had undergone medical treatment and incurred expenditure, the applicant ought to produce any bills and receipts for any reimbursement which in this case was absent and not proven. Therefore, the applicant's claim for loss of medical benefit was dismissed (see para 53).

(9) As the applicant provided no evidence to support his claim for distress, inconvenience, agony, embarrassment and suffering, the court was satisfied that the applicant was unable to prove any loss or damages. Therefore, the applicant was not entitled to claim the payment for damages and compensation for agony, embarrassment and suffering as prayed. Lastly, the court made the following orders: (a) the parties to bear their own costs for the assessment of damages; and (b) interest at 5%pa on the judgement sum to be paid from 4 April 2024 to the date of realisation (see paras 54, 57 & 59–60).

[Bahasa Malaysia summary

Responden kedua ialah Pihak Berkuasa Tempatan Seberang Perai manakala responden pertama adalah pihak berkuasa tatatertib responden kedua. Pemohon dalam kes bekerja dengan responden kedua sehinggalah pekerjaannya ditamatkan apabila pengerusi responden pertama mendapati dia bersalah atas pertuduhan menggunakan pengaruh luar untuk mencapai matlamat peribadi. Pemohon kemudian memfailkan permohonan semakan

kehakiman terhadap pemecatannya tetapi Mahkamah Tinggi menolak permohonan tersebut kerana Mahkamah Tinggi mendapati pemecatannya adalah sah. Walau bagaimanapun, atas rayuan, Mahkamah Rayuan memihak kepada pemohon dan membenarkan permohonan-permohonan berikut: (a) certiorari untuk membatalkan keputusan responden pertama; (b) perintah untuk ganti rugi dan taksiran ganti rugi; dan (c) kos dalam kausa. Terkilan, responden-responden memfailkan rayuan ke Mahkamah Persekutuan. Mahkamah Persekutuan menolak rayuan tersebut dengan beberapa pengubahsuaian pada perintah Mahkamah Rayuan. Mahkamah Persekutuan mengekalkan pemberian writ certiorari tetapi keputusan tersebut hanya akan menjadikan pemohon berada dalam penggajian responden kedua dari tarikh dia dipecat secara tidak sah pada 28 November 2013 sehingga tarikh penghakiman disampaikan. Mahkamah Persekutuan juga mengekalkan perintah Mahkamah Rayuan bahawa pemohon diberikan ganti rugi untuk ditaksir oleh hakim Mahkamah Tinggi. Kes semasa adalah berhubung dengan taksiran ganti rugi yang diperintahkan oleh Mahkamah Persekutuan. Berkaitan dengan taksiran ganti rugi, pemohon menuntut perkara-perkara berikut: (i) gaji dan elaun dari 3 Disember 2013 hingga 20 Oktober 2019 berjumlah RM397,090.70 dan bonus, bagi tahun 2013 hingga 2019 berjumlah RM30,944.72; (ii) ganti rugi bagi kehilangan kenaikan pangkat dan kenaikan gaji berkenaan dengan kenaikan pangkat tersebut; (iii) pencen selepas 15 Disember 2035, dan gaji serta bonus selepas 21 Oktober 2019 hingga 15 Disember 2035; (iv) gratuiti dari 1 Julai 2002 hingga 15 Disember 2035; (v) Gantian Cuti Rehat; (f) kehilangan faedah perubatan; dan (vi) ganti rugi untuk rasa malu, kesedihan dan penderitaan. Isu-isu yang timbul dalam kes ini adalah: (A) sama ada pemohon layak menuntut ganti rugi dari tarikh pemecatan secara tidak sah iaitu dari 28 November 2013 sehingga tarikh keputusan Mahkamah Persekutuan pada 21 Oktober 2019 ('isu pertama'); (B) sama ada pemohon berhak menuntut ganti rugi dari tarikh pemecatannya yang tidak sah sehingga pemohon dianggap bersara apabila mencapai umur 60 tahun pada 15 Disember 2035 ('isu kedua'); dan (C) sama ada pemohon berhak, dari tarikh dia dianggap bersara, untuk menuntut faedah pencen yang perlu dibayar kepada pemohon atau isterinya selepas kematian pemohon ('isu ketiga').

Diputuskan:

(1) Sudah menjadi undang-undang yang mantap bahawa mahkamah dalam menilai ganti rugi harus mengambil kira tiga prinsip asas iaitu: (a) pengembalian secara integrum; (b) keterpencilan ganti rugi; dan (c) mitigasi ganti rugi. Selanjutnya, dalam memberikan ganti rugi, mahkamah harus memastikan bahawa pemohon tidak dibenarkan untuk mendapat keuntungan daripadanya. Ia adalah aksiomatik bahawa pemohon yang menuntut ganti rugi yang besar mempunyai beban untuk membuktikan kedua-dua fakta dan jumlah ganti rugi sebelum dia boleh

A mendapatkan ganti rugi tersebut (lihat perenggan 32–33).

(2) Mahkamah mengambil maklum bahawa Mahkamah Persekutuan mengehadkan pemohon berada dalam penggajian responden kedua dari 28 November 2013 hingga 21 Oktober 2019 dan menyatakan bahawa B pengembalian kepada jawatan asal tidak wajar berdasarkan fakta kes. Daripada kedudukan ini, mahkamah berpendapat bahawa Mahkamah Persekutuan telah pun memutuskan liabiliti dan membenarkan semakan kehakiman pemohon untuk pemecatan tidak sah. Oleh kerana perintah Mahkamah Persekutuan adalah semata-mata untuk menentukan C taksiran ganti rugi, isu bahawa tuntutan tidak diplid adalah tidak timbul. Selanjutnya, mahkamah berpendapat bahawa keputusan Mahkamah Persekutuan telah menyebabkan pemberhentian sepenuhnya hubungan majikan dan pekerja. Dalam konteks yang sama, pemohon tidak lagi bekerja dengan responden kedua selepas tarikh penghakiman D Mahkamah Persekutuan. Oleh itu, tidak ada keperluan bagi responden-responden untuk mengeluarkan notis penamatan kepada pemohon selepas penghakiman Mahkamah Persekutuan (lihat perenggan 34–35).

E (3) Berhubung isu kedua, mahkamah mendapati tiada kesinambungan dalam perkhidmatan pemohon selepas daripada tarikh penghakiman Mahkamah Persekutuan yang membolehkan pemohon berhak mendapat apa-apa faedah berbangkit selepas itu. Oleh itu, pemohon tidak berhak menuntut ganti rugi dari tarikh pemecatan secara tidak sah F iaitu dari 28 November 2013 sehingga pemohon dianggap bersara apabila mencapai umur 60 tahun pada 15 Disember 2035. Berikutan dapatan ini, jawapan kepada isu pertama adalah secara afirmatif. Berhubung dengan ini, Mahkamah Persekutuan memutuskan di perenggan 110 dan 111 alasan penghakiman bahawa prinsip 'tiada kerja G tiada gaji' tidak diguna pakai oleh mahkamah-mahkamah di Malaysia. Mahkamah Persekutuan memerhatikan bahawa pemohon tidak sepatutnya dinafikan pampasan atas dasar dia tidak bekerja kerana responden-responden sendiri yang pada mulanya telah memecat pemohon secara tidak sah (lihat perenggan 38–41).

H (4) Mahkamah sedar bahawa menurut peraturan 27(4) Peraturan-Peraturan Pegawai Awam (Pelantikan, Kenaikan Pangkat dan Penamatan Perkhidmatan) 2012 ('Peraturan 2012 tersebut'), pergerakan gaji tahunan pemohon adalah berdasarkan prestasi kerja tahunannya dan dalam kes semasa, tiada penilaian prestasi kerja pemohon dari tarikh I pemecatan pemohon sehingga penghakiman Mahkamah Persekutuan. Walau bagaimanapun, perlu diingat bahawa ketiadaan penilaian tersebut adalah disebabkan oleh pemecatan pemohon secara tak sah oleh responden-responden dan bukan disebabkan oleh kesalahan pemohon. Selain itu, mahkamah juga sedar bahawa pemberian bonus bukanlah

automatik tetapi tertakluk kepada syarat yang dikenakan oleh Kerajaan Persekutuan atau Pihak Berkuasa Negeri. Walau bagaimanapun, jika bonus diberikan dalam tempoh 2013 hingga 2019, pemohon juga berhak mendapat bonus, sama seperti pekerja-pekerja responden yang lain pada tempoh yang material. Oleh itu, mahkamah membenarkan tuntutan pemohon untuk gaji dan elaun serta bonus (lihat perenggan 43–45).

(5) Mahkamah berpandangan bahawa pekerja termasuk pemohon tidak mempunyai hak untuk dinaikkan pangkat kerana ia adalah soal budi bicara seperti yang dinyatakan dalam peraturan 39 Peraturan 2012 tersebut. Oleh itu, tuntutan pemohon untuk ganti rugi bagi kehilangan kenaikan pangkat dan kenaikan gaji berkenaan dengan kenaikan pangkat tersebut adalah ditolak. Mengenai tuntutan pencen pemohon, perlu ditegaskan semula bahawa menurut penghakiman Mahkamah Persekutuan, pemohon tidak lagi bekerja dengan responden kedua. Justeru itu, pada pendapat mahkamah, pemohon juga bukan pekerja responden kedua yang telah bersara dan oleh itu, mahkamah menolak tuntutan pencen pemohon (lihat perenggan 46–47).

(6) Jelas menunjukkan bahawa pemohon telah berada dalam perkhidmatan responden kedua mulai 1 Julai 2002 sehingga 21 Oktober 2019 sahaja iaitu selama 17 tahun, tiga bulan dan 20 hari. Selepas itu, pemohon tidak lagi boleh dianggap sebagai pekerja responden kedua. Isu pemohon layak mendapat pencen dan gratuiti tidak timbul kerana tiada 'deeming fiction' dalam Akta Pencen Pihak Berkuasa Berkanun dan Tempatan 1980 bahawa pencen, ganjaran dan faedah lain adalah terakru untuk pemohon secara automatik oleh fiksyen tersebut. Dalam keadaan sedemikian, pemohon juga tidak boleh dianggap akan meneruskan perkhidmatan sehingga dia mencapai umur persaraan. Oleh itu mahkamah menolak tuntutan pemohon untuk gratuiti (lihat perenggan 50).

(7) Disebabkan oleh keadaan yang tidak dijangka yang menyebabkan pemohon dipecat secara tidak sah, mahkamah berpendapat bahawa pemohon hanya telah dinafikan peluang untuk memohon pengumpulan cuti rehat yang tidak digunakan bagi tempoh dari 2 Disember 2013 hingga 21 Oktober 2019 dan tidak lebih daripada itu. Oleh itu, mahkamah mendapati pemohon layak menerima Gantian Cuti Rehat tertakluk kepada bilangan hari tetapi terhad kepada 150 hari daripada maksimum 15 hari/setahun yang tidak digunakan sahaja yang dikira dari 2013 hingga 21 Oktober 2019. Berdasarkan rekod dan pengiraan mahkamah, pemohon berhak menerima Gantian Cuti Rehat berjumlah RM12,400.80 (lihat perenggan 52).

(8) Berkenaan dengan tuntutan pemohon untuk kehilangan kelayakan manfaat perubatan berjumlah RM10,000, tidak dipertikaikan bahawa semua pekerja responden kedua menerima rawatan perubatan percuma

di semua hospital kerajaan dan klinik kesihatan kerajaan. Dalam apa-apa keadaan lain jika pemohon telah membelanjakan wang bagi menjalani rawatan perubatan, pemohon hendaklah mengemukakan apa-apa bil dan resit untuk apa-apa pembayaran balik yang mana dalam kes ini tiada dan tidak dibuktikan. Oleh itu, tuntutan pemohon untuk kehilangan manfaat perubatan adalah ditolak (lihat perenggan 53).

(9) Memandangkan pemohon tidak mengemukakan keterangan untuk menyokong tuntutannya untuk kesusahan, kesulitan, keperitan, rasa malu dan penderitaan, mahkamah berpuas hati bahawa pemohon tidak dapat membuktikan apa-apa kehilangan atau kerugian. Oleh itu, pemohon tidak berhak menuntut bayaran ganti rugi dan pampasan atas keperitan, keaiban dan penderitaan seperti yang dipohon. Akhir sekali, mahkamah membuat perintah-perintah berikut: (a) pihak-pihak menanggung kos mereka sendiri untuk taksiran ganti rugi; dan (b) faedah pada kadar 5% setahun ke atas jumlah penghakiman yang perlu dibayar dari 4 April 2024 hingga tarikh realisasi (lihat perenggan 54, 57 & 59–60).]

Cases referred to

Datuk Mohd Ali bin Hj Abdul Majid & Anor (both practising as Messrs Mohd Ali & Co) v Public Bank Bhd [2014] 4 MLJ 465; [2014] 6 CLJ 269; [2014] 4 AMR 301, FC (refd)

Lonrho plc and others v Fayed and others (No 5) [1994] 1 All ER 188, CA (refd)

Milicent Rosalind Danker & Percetion Management International Limited v Malaysia-Europe Forum Berhad, Natasha Zulkifli & Anor [2011] MLJU 452; [2012] 2 CLJ 1076, HC (refd)

Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai & Anor v Muziadi bin Mukhtar [2020] 1 MLJ 14; [2020] 1 CLJ 595; [2019] 1 LNS 1652, FC (refd)

Legislation referred to

Federal Constitution art 147

Local Government Act 1976

Public Officers (Appointment, Promotion and Termination of Service) Regulations 2012 regs 27(4), 39, 39(1)

Public Officers Regulations (Conduct and Disciplinary Rules) 1995 reg 4(2)(h)

Statutory and Local Authorities Pensions Act 1980 ss 3(1), 9

Vijaya Navaratnam (with Felix Lim) (Mureli Navaratnam) for the appellant.

Karin Lim Ai Ching (with Murgan a/l D Maniam) (Presgrave & Matthews) for the respondents.

Rozana Ali J:

INTRODUCTION

[1] This judgment is delivered ensuing from the decision of Federal Court on 21 October 2019 in the case of *Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai & Anor v Muziadi bin Mukhtar* [2020] 1 MLJ 14; [2020] 1 CLJ 595; [2019] 1 LNS 1652 to remit this matter to the High Court of Penang for assessment and further order that the matter be fixed for case management forthwith with the following order:

> [115] Based on the foregoing, we dismiss this appeal with costs. That said, we are however minded to modify the order of the Court of Appeal as follows:
>
> [i] Prayer (1) in terms of the respondent's application for judicial review is allowed; in that, we uphold the grant of the writ of certiorari quashing the decision of the first appellant to dismiss the respondent on 28 November 2013 and communicated to him on 2 December 2013. However, we make a further direction that the effect of our decision to quash shall only render the respondent in the employment of the second appellant from the date he was unlawfully dismissed on 28 November 2013 up to the date of delivery of this judgment.
>
> [ii] We also, uphold the order of the Court of Appeal granted in terms of prayer (4) ordering that the respondent be awarded damages to be assessed. However, because this appeal is as a result of protracted litigation, we order that the assessment proceedings be heard by a judge of the High Court and not a Deputy Registrar. We accordingly remit this matter to the High Court of Penang for assessment and further order that the matter be fixed for case management forthwith.

[2] For the purpose of clarity, the Court of Appeal earlier granted the following order:

(a) that the respondent be granted a certiorari to quash the decision of the first appellant (prayer 1);

(b) an order for damages and that damages be assessed by a deputy registrar (prayer 4); and

(c) cost of RM20,000 to be paid by the respondent to the applicant subject to allocatur fee (prayer 5).

FACTS OF THE CASE

[3] The applicant was at the material time employed by the second appellant as an engineer vide a contract of service which also incorporated and adopted the General Orders and Public Officers Regulations (Conduct and Disciplinary Rules) 1995. The first respondent is the disciplinary body and the

second respondent is the Local Authority of Seberang Perai established under the Local Government Act 1976.

[4] After the confirmation of his service, the applicant was transferred from the Engineering Department to the Health Services Department. Dissatisfied, the applicant challenged the said transfer in the High Court, on the grounds that the second respondent was in breach of the employment contract as the work was not within his scope of expertise. However, the suit was dismissed by the High Court. The first respondent and its disciplinary body then initiated disciplinary proceedings against the applicant as he turned up late for work. The first respondent found the applicant guilty and was given a warning and also a deferment of his annual salary increments for 12 months. The applicant applied for a judicial review in the High Court, but the application was dismissed.

[5] Sometime thereafter, allegations sprung that the applicant had raised the matter of his transfer to the State Assemblyman of Penang who in turn brought up the issue during the sitting of the Penang State Assembly on 5 September 2012. On 29 April 2013, the second respondent's Director of Management Services informed the second respondent's Director of Health Services that the applicant had breached the disciplinary rules in purporting to apply external influence to achieve a personal aim in contravention of reg 4(2)(h) of the 1995 Regulations.

[6] The applicant was later charged, under reg 4(2)(h) of the 1995 Regulations. Denying the charge, the applicant argued that, inter alia, he had never met the State Assemblyman and there was no need for the latter's support as he had already initiated the suit at the High Court challenging his transfer.

[7] Pursuant to a meeting dated 28 November 2013 and after deliberating on the charge and the applicant's written explanation, the Chairman of the first respondent on second December 2013 issued a letter informing that the applicant was found guilty and punished with dismissal from the second respondent employment. It was against his dismissal that the applicant filed the second judicial review where the High Court, holding the view that the dismissal was valid and dismissed the applicant's action.

[8] Upon appeal, the Court of Appeal allowed the applicant's appeal and set aside the decision of the High Court on the ground that the dismissal was tainted with procedural impropriety. The Court of Appeal granted the following prayers in the applicant's judicial review application:

(a) that the applicant be granted a certiorari to quash the decision of the first appellant ('prayer (1)');

(b) an order for damages and that damages be assessed by a Deputy Registrar ('prayer (4)'); and

(c) costs in the cause ('prayer (5)').

[9] On appeal by the first and second respondents, the Federal Court on 21 October 2019 dismissed the appeal with costs with modification to the order of the Court of Appeal. The Federal Court uphold the grant of the writ of certiorari quashing the decision of the first respondent in dismissing the applicant on 28 November 2013. However, the decision to quash shall only render the applicant in the employment of the second respondent from the date he was unlawfully dismissed on 28 November 2013 up to the date of delivery of the judgment. The Federal Court also uphold the order of the Court of Appeal in that the applicant be awarded damages to be assessed by a judge of the High Court.

ISSUES TO BE TRIED

[10] The issues to be tried (encl 73) which are as follows:

(a) whether the applicant is entitled to claim for damages from the date of his unlawful dismissal which is from 28 November 2013 until the date of the decision of the Federal Court on 21 October 2019;

(b) whether the applicant in entitled to claim for damages from the date of his unlawful dismissal which is from 28 November 2013 until the applicant is deemed to retire upon attaining the age of 60 years on 15 December 2035; and

(c) whether the applicant is entitled, from the date he is deemed to retire, to claim pension benefits which is payable to the applicant or his wife after the demise of the applicant.

THE APPLICANT'S PARTICULARS OF DAMAGES

[11] The applicant prayed to be awarded the following damages:

No	Headings	Claim Amount RM
1	Salary and allowances from 3 December 2013 till 20 October 2019	RM397,090.70
2	Bonus, for the years 2013 till 2019	RM30,944.72
3	Salary and allowances from 21 October 2019 till 15 December 2035:	RM1,617,892.55
4	Bonus, from 2020 till 2035:	RM116,586.30
5	Damages for loss of promotion and its increment	RM15,000

No	Headings	Claim Amount RM
6	Gratuity	RM261,464.23
7	Golden Handshake	RM53962.44
8	Pension payable to applicant RM5,216.24 per month from 16 December 2035 till April 2040 (life expectancy of 64.4 years)	
9	Pension payable to applicant's wife RM5,216.24 per month from May 2040 till July 2042 (life expectancy of 66.6 years)	
10	Embarrassment, anguish and suffering:	RM500,000
11	Legal fees and disbursements incurred up till date (proceedings in the High Court, Court of Appeal, leave application at the Federal Court and Appeal at the Federal Court) and costs in assessment proceedings to be as per legal fees and disbursements incurred and/ or payable in respect of assessment proceedings.	

THE APPLICANT'S SUBMISSION

[12] The Federal Court did not in anywhere of the grounds of judgment restrain or limit the assessment of damages of the applicant from 3 December 2013 to 21 October 2019 and modified the assessment proceedings be heard by the High Court in view of the protracted litigation proceedings. The Federal Court only render the applicant in the employment of the second respondent from the date he was unlawfully dismissed on 28 November 2013 up to the date of delivery of the judgment.

[13] The applicant is entitled as of right to the damages for the period from 28 November 2013 till 21 October 2019 and it should not be considered as compensation. As to this the applicant should be awarded as of right the sum RM397,090.70 and the damages of RM1,617.892.55 for the period of 22 October 2019 to 15 December 2035.

[14] The Federal Court did not deprive the applicant from continuing in service based on his past misconduct as alleged by the respondents but held that an effective reinstatement is not warranted due to the background facts of this case.

[15] As to the respondents' contention that since an effective reinstatement is not warranted, the applicant was not entitled to be placed in a status quo position until he retires at the age of 60, the applicant submit that such

contention is baseless. In view of the effective reinstatement is not available due to the surrounding facts and circumstances, the applicant should be compensated for this.

[16] Due to the unlawful dismissal, the applicant's rights to pension and gratuity have been taken away and ought to be compensated. The applicant does not fall under any category of Statutory and Local Authorities Pensions Act 1980 ('the SLAP 1980') and to be considered as having retired. The SLAP 1980 has not provided for the accrual of pension, gratuity or other benefits in the applicant's favour by a 'deeming action' in the event of the court limiting or restricting his employment with the second respondent upon granting a writ of certiorari quashing the decision of the first respondent to dismiss the applicant.

[17] As to the issues of non-pleading, the applicant submitted that it would be premature and in fact inconsistent for the applicant to plead such losses and damages especially when the applicant was praying for an order of certiorari to quash the respondents' decision. The losses and damages only came into picture when the Federal Court had modified the reliefs granted by Court of Appeal and found that effective 'reinstatement' was not warranted. From the date of filing of the judicial review until the appeal in the Federal Court, the respondents had never raised this issue of reliefs not being pleaded in the statement of claim. In fact, the respondents had even submitted on the merits of the said losses/damages in the Federal Court. This issue is clearly an afterthought by the respondents and they do not suffer any prejudice due to this.

[18] As to the subject of 'gainful employment', the applicant has testified he only carried out some part-time work where there was no fixed income and he had been using his savings for the period of the unlawful dismissal. The applicant submitted that he is entitled to back wages from 2 December 2013 until 21 October 2019 without any deduction as he was not gainfully employed during those periods.

[19] The applicant claimed that he has suffered major embarrassment among his peers due to the alleged external influence by the applicant to advance a claim related to public service which he was ultimately punished with dismissal. Due to the unfair dismissal, the applicant has suffered emotionally as he has to attend various court proceedings to determine the issues without a certainty of being reinstated. With these circumstances, the applicant is entitled to claim the damages for embarrassment, anguish, and suffering.

F. THE RESPONDENT'S SUBMISSION

[20] The applicant is not a pensioner and has not retired from the Local Authority's Service. The Federal Court did not decide that the applicant is deem to continue in service from the date of the Federal Court judgment until he attains the retirement age of 60. Thereafter he is also not deemed to have retired from the service of the Local Authority and to be awarded gratuity and pension and other benefits. Hence, the applicant is not entitled for gratuity, pension and other benefits. The applicant's wife is also not entitled to pension benefits under art 147 of the Federal Constitution.

[21] When the Federal Court modified the reliefs granted by the Court of Appeal and held that effective 'reinstatement' is not warranted and limited or restricted the applicant's employment with the second respondent from the date of his dismissal until the date of the Federal Court decision, damages to be assessed should be limited or restricted to back wages only. The Federal Court did not in the grounds of judgment order compensation in lieu of reinstatement from the date of its decision.

[22] It is submitted that this court 'should take into account all relevant matters including the fact, where it exists, that the workman has been gainfully employed elsewhere after his dismissal'. In this case the applicant had been self-employed from the date of his dismissal to the date of the Federal Court decision. So, the fact of 'gainful employment' by the applicant during the said period should be taken into account.

[23] The respondents submitted that the employment of the applicant to date and to remain as an employee of the second respondent till the age of retirement is baseless and without any justification. The Federal Court had clearly stated that granting a certiorari cannot be taken as meaning 'reinstatement' and upholding the grant of certiorari, moulded the relief and deprived the applicant from continuing in service.

[24] The provisions of SLAP 1980 are not applicable to the applicant as the Federal Court modified the order of the Court of Appeal and limited the applicant in the employment of the second respondent from 28 November 2013 to 21 October 2019.

[25] The applicant can only claim for damages from 28 November 2013 to 21 October 2019 and is subject to assessment of damages. The question of the applicant ought to be adequately compensated from the date of his dismissal till he attains the age of retirement was not ordered by the Federal Court. The applicant is not entitled to claim for future damages after the date of the Federal Court judgment.

[26] The applicant is not entitled as of right to damages for the period from 28 November 2013 till 21 October 2019 but it is still subjected to assessment of damages. The applicant is not entitled as of right to the sum of RM397,090.70 for the period of 28 November 2013 to 21 October 2019 including the back wages. The payment of full back wages is not automatic and cannot be granted mechanically. The applicant must show that he was not gainfully employed during this period.

[27] The applicant also is not entitled at all to the sum of RM1,617,892.55 for the period of 22 October 2019 to 15 December 2035.

[28] The applicant is not entitled to claim for damages for deprivation of the right to livelihood as the Federal Court had already moulded the relief which he was entitled to subject to assessment of damages. Moreover, this claim was never pleaded in the statement of claim nor was it allowed in the order of the Federal Court. The applicant only plucked the figure of RM500,000 for the loss of livelihood without submitting the basis of such figure.

[29] The contention that the applicant has legitimate expectation to be promoted has no relevance on the facts of this case as the applicant has no vested right to be promoted. The applicant is not entitled to damages for loss of promotional opportunity for the period 28 November 2013 until 21 October 2019 as he had not complied with reg 39 of the Public Officers (Appointment, Promotion and Termination of Service) Regulations 2012 which provides that the promotion of an officer is based on merit. In addition, his claim in itself is speculative.

[30] Since the applicant is not in the employment of the second respondent from 22 October 2019 until he attains the age of retirement at 60 on 15 December 2035, he is not entitled to claim bonus as it is also speculative.

[31] Lastly, the applicant is not entitled to gratuity, pension and other benefits as he is not eligible under SLAP 1980.

ANALYSIS AND FINDINGS

[32] It is trite that the court in assessing damages take into consideration three fundamental principles. They are as follows: (a) restitution in integrum, (b) remoteness of damages; and (c) mitigation of damages. Further in awarding damages, the court ensure that the applicant is not allowed to profit from it. The Federal Court in *Datuk Mohd Ali bin Hj Abdul Majid & Anor (both practising as Messrs Mohd Ali & Co) v Public Bank Bhd* [2014] 4 MLJ 465; [2014] 6 CLJ 269; [2014] 4 AMR 301 held:

A [32] It is trite law that a claimant claiming damages must prove that he has suffered the damage. The claimant has the burden of proving both liability and quantum of damages, before he can recover the sum claimed. This follows from the general rule that the burden of proving a fact is upon him who alleges it and not upon him who denies it, so that where a particular allegation forms an essential part of a person's B case, the proof of such allegation falls on him (see s 103 of the Evidence Act 1950). If he fails to prove both the liability and the quantum of damages, he loses the action.

[33] Therefore, in a claim for damages, it is not sufficient for the plaintiff to merely state the amount of damages that he is claiming, he must prove the damage that he C had in fact suffered to the satisfaction of the court ...

[33] In this case it is axiomatic that the applicant seeking substantial damages has the burden of proving both the fact and the amount of damages before he can recover. Thus, the applicant must understand that if he brings an D action for damages it is for him to prove the damages. It is not enough to write down the particulars and, so to speak, throw them at the head of the court saying, 'this is what I have lost. I ask you to give me these damages'.

E **[34]** Prior proceeding with the assessment of damages, I took cognisance that instead of reinstating the applicant, the Federal Court intervened and modified the order of the Court of Appeal whereby the Federal Court limited the applicant in the employment of the second respondent from 28 November 2013 to 21 October 2019 having taken into account of the related grounds as F stated in para 109 of the judgment. In that instance, the Federal Court stated that an effective reinstatement is not warranted on the facts of the case. From this position, I am of view that the Federal Court had already decided on the liability and allowed the applicant's judicial review for the unlawful dismissal. The decision of the Federal Court to mould the relief after quashing the G decision of the first respondent is final and not questionable. The relief granted to the applicant is clear. Since the order of the Federal Court is to solely determine the assessment of damages, I find that the issue of the claim was not pleaded does not arise.

H **[35]** At this juncture, I am of the considered view that there is a severance of employment by the Federal Court where its decision on 21 October 2019 brought about a complete cessation of employer and employee relationship. In the same contact the applicant is no longer in the employment of the second respondent after the date of the Federal Court judgment. It is my view that I there is no necessity for the respondents to issue a Notice of Termination to the applicant after the Federal Court judgment.

[36] With these in mind, the next issue is *whether the applicant is entitled to claim for damages from the date of his unlawful dismissal which is from*

28 November until the applicant is deemed to retire upon attaining the age of 60 years on 15 December 2035.

[37] It is worth to note that the Court of Appeal has allowed reinstatement but Federal Court did not allow an effective reinstatement. In that the Federal Court had only granted damages to the applicant instead of reinstatement. I also took into account of the applicant submission that the Federal Court did not in anywhere in the grounds of judgment restrain or limit the assessment of damages of the applicant from 3 December 2013 to 21 October 2019 but only ordered for this matter to be remitted to the High Court of Penang for assessment of damages before a judge.

[38] Having scrutinised the Court of Appeal decision, it is clear that the damages awarded as in prayer 4 is related to the wrong dismissal where a certiorari was ordered. Logically speaking the applicant's employment with the respondent continues as usual. Thus, in my opinion, at this juncture the damages awarded therefore must be in relation to the wrongful dismissal and not beyond. It is noted that on 26 March 2018, the Federal Court had granted a stay of execution of the Court of Appeal's judgment dated 12 October 2017 until the final disposal of the appeal to the Federal Court. To my mind, since there is no longer a continuity of the applicant's service as it has ceased on 22 October 2019 and also the Federal Court upheld prayer 4 of the Court of Appeal, I am inclined to view that such order for damages to be assessed is related to the employment of applicant until 21 October 2019 which is in respect of the duration of the wrongful dismissal. In other word, there is no continuity in service of the applicant after the date of the Federal Court judgment that renders the applicant to be entitled to any consequential benefits thereafter.

[39] Thus, in assessing the damages, it is not open for this court to hold that the applicant is deemed to retire upon attaining the age of 60 years on 15 December 2035 and subsequently entitled to claim for damages from the date of his unlawful dismissal which is from 28 November 2013 until the applicant reach the retirement age of 60 years old. Therefore, I find that the applicant is not entitled to claim for damages from the date of his unlawful dismissal which is from 28 November 2013 until the applicant is deemed to retire upon attaining the age of 60 years on 15 December 2035.

[40] The next issue is *whether the applicant is entitled to claim for damages from the date of his unlawful dismissal which is from 28 November 2013 until the date of the decision of the Federal Court on 21 October 2019*. Following to my finding above, the answer to this issue is in the affirmative. Relying back to the damages prayed by the applicant, I made the finding accordingly.

[41] The Federal Court held at paras [110] and [111] of the grounds of judgment that the principle of 'no work no pay' has not been applied by the courts in Malaysia. The Federal Court observed that the applicant ought not to be denied compensation on the basis that he did not work as it was the respondents themselves who unlawfully dismissed him in the first place.

Salary and allowances from 3 December 2013 till 20 October 2019 amounting RM397,090.70 and bonus, for the years 2013 till 2019 amounting RM30,944.72

[42] On the score, I find that the applicant is entitled to claim the period from first December 2013 till 21 October 2019 in relation with the salary and allowances.

[43] I am mindful that pursuant to reg 27(4) of the Public Officers (Appointment, Promotion and Termination of Service) Regulations 2012, the annual salary movement of the applicant is based on his annual work performance. In this case, I noted that from the date of his dismissal ie 28 November 2013 and upon communication of the decision of dismissal on 2 December 2013 until the judgment of the Federal Court on 21 October 2019 there was no appraisal of the applicant's work performance in which making the applicant is not entitled to annual salary movement or annual increment. However, it must be borne in mind that the absence of such appraisal of the applicant's work performance was the result of the respondent wrongful dismissal and not the fault of the applicant.

[44] I am also mindful that bonus is not automatic but subject to conditions imposed by the Federal Government or the State Authority. However, if the bonus were given during the period of 2013 to 2019, it is rightfully also the applicant is entitled to it, same with other employees of the respondent at the material period.

[45] In this aspect the applicant is entitled from 2 December 2013 until 21 October 2019 with annual increment in the year 2014, 2015, 2016, 2017, 2018 and 2019 which amount to RM397,090.70. 36.12 and the bonus for the year 2013 to 21 October 2019 which amount to RM30,944.72. Thus, the applicant is entitled to be paid the bonus for the year 2013 until 21 October 2019 with a total gross salary with annual increment from 2 December 2013 until 21 October 2019 including bonus which amounts to RM428,035.42.

Damages for loss of promotion and the increment in respect of such promotion

[46] Regulation 39(1) of the Public Officers (Appointment, Promotion and Termination of Service) Regulations 2012 provides that the promotion of an

officer is based on merit. Thus, promotion is an advancement in rank, grade or both and it is at the discretion of the Promotion Board. On this score, I am of the considered view that an employee including the applicant does not have a right to be promoted since it is a matter of discretion as specified in reg 39. The applicant claim under this heading is dismissed,

Pensions after 15 December 2035 and salary and bonus after 21 October 2019 till 15 December 2035

[47] It must be reiterated that pursuant to the judgment of the Federal Court, the applicant is no longer in the employment of the second respondent. Thus, it is my opinion that the applicant is also not a retired second respondent's employee. Since, the Federal Court did not put the applicant in continuous employment on the same terms and conditions that he previously enjoyed in his employment with the second respondent, the issue of the applicant applying for early retirement or continuing in the employment until he attains the age retirement at 60 years does not arise. Therefore, I find that the applicant's claim under this heading is dismissed. It follows that as to the entitlement of his pension by his wife after the applicant's demise as claimed is also dismissed.

Gratuity from 1 July 2002 till 15 December 2035

[48] By and large gratuity is a payment given to the employees when they resign or retire in recognition of long and meritorious service. Gratuity is a lump sum payment and is paid only once on retirement. According to SP3, pension and gratuity is payable only if the Public Services Department is satisfied that the applicant has complied with the conditions imposed under SLAP 1980. SP3 also quoted s 3(1) of the SLAP 1980 which provides that '(1) No employee shall have an absolute right to compensation for past service or to any pension, gratuity or other benefit under this Act'.

[49] The conditions for retirement are stated in s 9 of the SLAP 1980 and only then the applicant is entitled to pension, gratuity and other benefits. The applicant had submitted that he is be deemed to have retired from the service of the second respondent on 22 October 2019 and entitled to such benefits after attaining the age of 60 years old in 2035. However, since there is no provision in SLAP 1980 for payment of pension or gratuity when the applicant ceases to be in the service of the second respondent on 21 October 2019, the applicant who will be 43 years ten months six days old on that date, is not entitled to any payment under SLAP 1980 from the Pension Authority.

[50] It is clear that the applicant has been in the service of the second respondent from 1 July 2002 until 21 October 2019 only, which is 17 years

three months 20 days. Thereafter, the applicant cannot longer be deemed to be in the employment of the second respondent. There is no provision in SLAP 1980 for payment of pension or gratuity when the applicant ceases to be in the service of the second respondent on 21 October 2019. Thus, in my opinion the issue of the applicant being entitled to pension and gratuity does not arise as there is no 'deeming fiction' in the SLAP 1980 that the pension, gratuity and other benefits accrue in favour of the applicant automatically by such fiction. In such circumstances, the applicant cannot also be deemed to be continuing in service till he attains the age of retirement. I therefore find that the damages under this heading is dismissed.

GOLDEN HANDSHAKE

[51] Payment of Golden Handshake is paid when the employee retires at the age of 60 in regard to the unused leave accumulated up to 150 days. According to the respondents, on record, the applicant did not apply to accumulate any of his unused vacation leave for the purpose of Golden Handshake in the years 2002 to 2013. During the period of dismissal until 21 October 2019, the applicant did not accumulate the unused vacation leave for the years 2013 until 21 October 2019. The applicant can only accumulate his unused vacation leave for the years concerned for the purpose of payment of Golden Handshake provided the Head of Department approves it.

[52] The question here is whether the applicant is entitled for the unused leave for the period of dismissal until 21 October 2019 bearing in mind that the application for the unused vacation leave for the purpose of Golden Handshake cannot be made due to the wrongful dismissal. Due to the unforeseen circumstances which led to the unlawful dismissal of the applicant, I am of the view the applicant has been deprived of the opportunity to apply for the accumulation of the unused vacation leave only with respect of the duration from 2 December 2013 until 21 October 2019 and not beyond. Therefore, I find that the applicant is entitled to Golden Handshake subject to number of days but limited to 150 days only calculated from 2013 until 21 October 2019 of his unused maximum of 15 days/annually. Based on the record and my calculation, the applicant for the Golden Handshake is RM12,400.80. The calculation following the formula for FCGR is 1/30 x (Last Drawn Pay + *Imbuhan Tetap*) x No of days. (1/30 x (3,743.74 (encl 89) +300) x 92 days. The 92 was calculated from 1 January 2014 till 21 October 2019 = 90 days and the balance of two days is from 2 December 2013.

Loss of medical benefits

[53] The applicant is seeking damages for loss of medical benefits entitlement amounting to RM10,000. It is not disputed that all employees of second respondent receive free medical treatment in all government hospitals

and government health clinics. In any other circumstances if the applicant has undergone medical treatment and incurred expenditure, the applicant is to produce any bills and receipts for any reimbursement which in this case is absent and not proven. I find that the claim for loss of medical benefit is dismissed.

Damages for embarrassment, anguish and suffering

[54] It was submitted that the applicant has suffered major embarrassment among his peers due to the alleged external influence by the applicant to advance a claim related to public service which he was ultimately punished with dismissal. Due to the unfair dismissal, the applicant has suffered emotionally as he has to attend various court proceedings to determine the issues without a certainty of being reinstated. The applicant claimed for loss and damages to his professional reputational loss as well as for embarrassment, anguish and suffering caused by the respondents. However, the applicant provides no evidence to support his claim for distress, inconvenience, agony, embarrassment and suffering.

[55] In *Milicent Rosalind Danker & Percetion Management International Limited v Malaysia-Europe Forum Berhad, Natasha Zulkifli & Anor* [2011] MLJU 452; [2012] 2 CLJ 1076, the court held that:

> (5) It is trite law that damages for loss of reputation are not recoverable in an action founded on breach of contract. Any such claim would have to pass the remoteness rule in s 74 of the Contracts Act 1950. It could not be said with any firm degree of conviction that the parties contemplated loss of reputation as arising from the breach of the contract. That sort of damage was far too remote. Therefore, damages for loss of reputation generally could not be claimed except in actions for defamation. No damages were therefore allowed in this regard.

[56] The court cited in *Lonrho plc and others v Fayed and others (No 5)* [1994] 1 All ER 188, the Court of Appeal in England held:

> ... Damages for injury to reputation or business reputation or injury to feelings could only be recovered in an action for defamation, in which justification could be pleaded by way of an absolute defence, and not in an action for conspiracy and the difficulty of meeting a defence of justification could not be side-stepped by bringing an action for conspiracy to injure by lawful means. Furthermore, injury to reputation and to feelings was, with limited exceptions, a field of its own, and the established principles in that field also could not be side-stepped by alleging a different cause of action ...

[57] As the applicant led no other evidence, other than his own, to seek damages, I am satisfied that the applicant was unable to prove any loss or

damages. Therefore, the applicant is not entitled to claim the payment for damages and compensation for agony, embarrassment and suffering as prayed.

Legal fees and disbursements incurred up till date (proceedings in the High Court, Court of Appeal, leave application at the Federal Court and appeal at the Federal Court) and costs in the assessment proceedings to be as per legal fees and disbursements incurred and/or payable in respect of assessment proceedings

[58] Not allowed.

[59] Parties is to bear their own costs for the assessment of damages.

[60] Interest at 5%pa on the judgment sum to be paid from 4 April 2024 to the date of realisation.

Order accordingly.

Reported by Dzulqarnain Ab Fatar